

Exhibit A

Transcript of Motions Hearing
Before the Honorable Mark Lane
(December 1, 2022) (Excerpts)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KEVIN CLARKE, TREVOR BOECKMANN,) AU:22-CV-00909-LY
HARRY CRANE, CORWIN SMIDT, ARISTOTLE)
INTERNATIONAL, INC., PREDICT IT, INC.,)
MICHAEL BEELER, MARK BORGI,)
RICHARD HANANIA, JAMES D. MILLER,)
JOSIAH NEELEY, GRANT SCHNEIDER,)
WES SHEPHERD,)
)
Plaintiffs,)
)
v.) AUSTIN, TEXAS
)
COMMODITY FUTURES TRADING COMMISSION,)
)
Defendant.) DECEMBER 1, 2022

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MARK LANE

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produced by computer.

1 (Proceedings began at 10:08 a.m.)

2 THE CLERK: The Court calls the following for a
3 motion hearing: 1:22-CV-909, *Kevin Clarke and others v.*
4 *Commodity Futures Trading Commission.*

5 THE COURT: Let's start with announcements. Tell me
6 who you are and who you represent. We'll start over here on my
7 left who I trust are the plaintiffs.

8 MR. EDNEY: Yes, Your Honor. My name is
9 Michael Edney from the Hunton Andrews Kurth Andrews Firm. I'm
10 here with my colleague, John Byron. We represent the
11 plaintiffs in this action, Kevin Clarke, Trevor Boeckmann,
12 Harry Crane, Corwin Smidt, Predict It, Incorporated, Aristotle
13 International, Incorporated, Michael Beeler, Mark Borghi,
14 Richard Hanania, James Miller, Josiah Neeley, Grant Schneider,
15 and Wes Shepherd.

16 I have with me at counsel table today some of the
17 plaintiffs in this action. Mark Borghi here is right across
18 from me. I have Dave Mason, who is the general counsel of
19 Aristotle International, Incorporated, one of the corporate
20 plaintiffs in this case. I have Kevin Clarke, our lead
21 plaintiff. He's right there at the corner in the coat and tie.
22 I have Wes Shepherd, another one of our Austin-based trader
23 plaintiffs in the case. I have Josiah Neeley, one of the
24 plaintiffs in the case here based in Austin, and I have
25 John Phillips, the CEO of Aristotle International, Incorporated

1 and Predict it, Incorporated.

2 THE COURT: All right. Thank you, Mr. Edney. And
3 over here on my right.

4 MR. DRUDING: Good morning, Your Honor. It's
5 Kyle Druding for the U.S. Commodity Futures Trading Commission.

6 THE COURT: All right. Welcome to everyone.

7 I'm going to tell a little story, and then we'll get
8 started. I was a prosecutor, state and federal prosecutor, for
9 probably too long, when I was fortunate to get this job a
10 little over ten years ago, so I had a great deal to learn about
11 civil law, how to be a judge, how to write. And with the
12 assistance of good people that I work with, I think I've done a
13 reasonably credible job. I maybe don't get it right all the
14 time, but I sure try.

15 As it relates to these hearings, when I started,
16 because of my ignorance, I would just turn to lawyers and have
17 them, Mr. Edney, you go ahead for 5, 10 minutes, and then
18 Mr. Druding, you go and respond. And that masked my ignorance
19 with regard to what I was doing a little bit.

20 But that's -- how I've handled these hearings has
21 changed. And another part of that change is I cannot come out
22 here and fake it. I mean, the only way for me to do that is
23 just sit here and not ask you men any questions. I can't. I
24 just can't fake it, particularly in something like this that is
25 introducing a bunch of things I've never even heard of and an

1 in terms of magnitude investment. I would say he's number one
2 in terms of -- he's one of the most active, engaged traders in
3 our community.

4 THE COURT: Why did you-all pick this division and
5 this district for this lawsuit? You could have picked
6 districts all across the country.

7 MR. EDNEY: No. We could not have picked any
8 district across the country. We --

9 THE COURT: It had to have somebody live in it.

10 MR. EDNEY: -- did need to have an engaged plaintiff.
11 But, you know, this --

12 THE COURT: But you've represented to me there are
13 thousands of people. So you probably could have picked any one
14 of the 94 federal districts, right?

15 MR. EDNEY: If I work very hard to find those
16 plaintiffs, I could have. I did not have all 94 federal
17 districts in front of me. We -- we had a number of plaintiffs
18 that were inter -- were interested in this, and among that we
19 did choose this one, Your Honor. That is true.

20 THE COURT: My question is: Whether it's Mr. Clarke,
21 Mr. Boeckmann or any of the other fellows that have been added,
22 the harm -- the harm is the same. They're all the same
23 wherever they are across the country. And, again, this whole
24 thing is about odds. I'm going to go out on a limb and suggest
25 you could have found a plaintiff in any of the other

1 continental federal districts. But that's not my point.

2 My point is, getting back to my original question,
3 why Austin? What is -- what is unique about Austin as opposed
4 to any of the other federal districts in which this case could
5 have been brought?

6 MR. EDNEY: What you think about Austin is that
7 Kevin Clarke is here. And I do understand, Your Honor, that
8 you -- you think if I put enough work into it, I could find
9 somebody anywhere else. But -- but, again, Mr. Clarke is very
10 engaged in the dynamics and academics of the market, and, you
11 know, I need an engaged plaintiff in this case. And, you know,
12 this man has been with us arm in arm through this case from the
13 very beginning, from the briefing, to the declarations, to the
14 theory behind it.

15 THE COURT: Who's making money? Because that's what
16 those cases are always about. Who's make -- who is the
17 interest, the outfit, that's making money? Is it the two
18 corporate entities?

19 MR. EDNEY: Well, sure.

20 THE COURT: And are they making a profit?

21 MR. EDNEY: Well, Your Honor, I mean, this is a
22 struggle for them insofar as -- insofar as they've had to
23 dedicate a lot of resources to try to comply with this
24 arbitrary termination decision.

25 And -- and they do -- they do make a profit on the

1 has been through a lot. They're 4,000 miles away. The CFTC is
2 threatening them with various sanctions. And -- and their
3 position has been made very clear, and it's -- it's at -- it's
4 at Exhibit B to the reply in support of the motion for
5 preliminary injunction. They -- they make very clear that they
6 would not be crashing these investors out of their -- out of
7 these contracts were it not for the -- for the FTC -- or the
8 CFTC's mandate to get them out by February 15th.

9 THE COURT: I understand. But the lack of an
10 institution's interest in this to me belies the original
11 purpose of this, that it was academic and research oriented.
12 It appears to me to be a gambling network. And I -- and I can
13 think of right off the top of my head a number of reasons why I
14 don't understand how that data can be very reliable for
15 Predict It purposes, but I'll put that aside for a second.

16 What I do want to know is: Why not file this in
17 D.C., where you would have already had your preliminary
18 injunction hearing? Instead we're on this sideshow here. This
19 stuff has been referred to me because District Judge Yeakel --
20 I mean, the most important statistic that Defense cited to me
21 was in their -- I think it was in the original brief, the
22 weighted case average. I don't know what they're doing in
23 D.C., but the weighted case average is significantly higher
24 here. And that's accurate. That's a reflection of what's
25 going on. And, unfortunately, that's why you're having --

1 you're forced to see me. Judge Yeakel has got too much on his
2 plate.

3 So why not have taken this to the District of
4 Columbia where you wouldn't have had a motion to transfer, you
5 wouldn't have had -- you still would have gotten a motion to
6 dismiss, but it wouldn't have gotten done before the
7 preliminary injunction. Instead, we're here. I don't know
8 when you're going to get your preliminary injunction hearing.

9 MR. EDNEY: Well, Your Honor, I do think that's
10 unfortunate, and I think the Court should be hearing our
11 preliminary injunction motion in the first instance even if
12 there's a pending motion to transfer. Courts do it all the
13 time.

14 THE COURT: You could be right.

15 MR. EDNEY: They put a PI in place and they say,
16 well, okay, let's preserve the status quo at least, and then
17 let's decide where it's supposed to be heard and let's decide
18 whether it should be dismissed, right? And I think that's -- I
19 think that's the appropriate course of action here, especially
20 since the CFTC has absolutely no defense for its February 15th
21 date.

22 Remember, our preliminary injunction motion isn't
23 trying to turn the lights back on on the entire market. It's
24 just trying to say, look, let's deal with this February 15th
25 date for the -- for the contracts that preexisted August 4th,

1 contracts in confidence, that they're not going to have the rug
2 pulled out from them by the CFTC.

3 THE COURT: But it sure looked like an academic
4 project in 2014. And now with Victoria not here and corporate
5 entities that stand to -- I saw a reference to \$250,000 in
6 potential losses, it sure is looking like a gambling
7 consortium.

8 MR. EDNEY: Your Honor, I think that that's not
9 accurate.

10 THE COURT: Then tell me what I got --

11 MR. EDNEY: And I don't think there's facts in the
12 record to draw that conclusion, and I also don't think it's the
13 case.

14 THE COURT: Well, tell me why I'm wrong. I mean,
15 because that's what it looks like.

16 MR. EDNEY: I mean, this -- this started -- and I
17 would direct the Court to that -- that no-action letter, which
18 I have in front of me here, too, right? I think it's, you
19 know, Exhibit 1 to our amended complaint. I think -- I think I
20 saw you -- I saw you have it up there. I do have a copy of it
21 if you don't.

22 THE COURT: No. I have it.

23 MR. EDNEY: Do you have it, Your Honor?

24 THE COURT: Yes, sir, I do.

25 MR. EDNEY: Okay. Let's go to -- let's go through

1 in their letter, insofar as they wouldn't be doing this, they
2 wouldn't be crashing all these investors out on February 15th,
3 if it weren't for what the CFTC is telling them to do in this
4 decision. So it is the efficient force of creating all of
5 this.

6 But, you know, obviously, coming into a federal court
7 and getting involved in litigation from 3,000 miles away is a
8 particularly -- is a bigger challenge for -- for a foreign
9 university than it is for a domestic corporation. There's
10 absolutely no question about that. But I can tell you that
11 they do care. They don't want this to -- they don't want this
12 to happen. They think it's wrong.

13 THE COURT: They should have been here.

14 MR. EDNEY: Well --

15 THE COURT: I mean --

16 MR. EDNEY: I'll take that back, Your Honor.

17 THE COURT: -- I respect what you're telling me, and
18 maybe you've talked to them. But they're not. And it's --
19 frankly, it speaks a lot of volume, at least for me, about what
20 this is really about.

21 MR. EDNEY: Well, Your Honor, share with me, what is
22 it really about? I mean, I --

23 THE COURT: It sure looks like an effort to -- it
24 looks like a gambling market to me. And I've got to tell you,
25 I need to go read some of the academic research. But how is it

1 that gamblers are the best predictors of who's going to win?
2 Because that presupposes the only people who are gambling are
3 people who have money, who have money to play on this -- in
4 this particular game.

5 I know a lot of people that won't go to Vegas. They
6 won't lay a bet. They won't play cards. So only the people
7 who are willing to make bets are going to be the best predictor
8 of who wins? I don't see the academic angle. But I don't have
9 to make that decision. What's more important to me is I don't
10 have an academic institution that was given this letter that's
11 expressed that they really care about this.

12 MR. EDNEY: I do think they care about it, and I
13 don't think they want to crash these people who relied on them
14 out of the market. And the only reason that that is happening
15 is in Victoria University's letter, is because of the CFTC's
16 decision.

17 And, Your Honor, I would not characterize these folks
18 as gamblers. I mean, look, the dividing line between investors
19 and gamblers from hedge funds, the people who invest in the
20 New York Stock Exchange, is a -- you know, is a --

21 THE COURT: I understand what --

22 MR. EDNEY: Is a very thin line.

23 THE COURT: I get it. We use different names. But
24 whether it's you're trading pork bellies, it's still kind of
25 gambling.

1 MR. EDNEY: Well, I mean, it is. But you -- you
2 don't have all these folks that are coming in -- they can't
3 come in and abuse it like they -- like they do in Vegas and,
4 you know, plop down their live savings on a contract. There's
5 an \$850 limit here. There was a balance that was tried -- that
6 was -- folks that were trying to draw between getting a liquid
7 market and -- and keeping it to its academic purposes. And
8 that's a decision that the CFTC made. If it's changed its
9 mind, okay, right?

10 But -- but, remember, what are we asking for, right?
11 We're not asking for an order from Your Honor or anyone else
12 that says the CFTC can never end the -- the Predict It market.
13 We're not -- we're not saying that. We're not asking for an
14 order that says they could never order liquidation of existing
15 contracts.

16 All we're saying is, tell us why, right? And I think
17 Your Honor's questions to opposing counsel drew that out. I
18 mean, there must be a reason for this. If there's been
19 violations, let us know what they are, right, so we can
20 evaluate whether that's really happened. If there's -- if
21 there's a reason behind February 15th as opposed to another
22 date and not letting these contracts go to their natural
23 conclusion, please tell us so a court can evaluate whether it's
24 arbitrary or capricious, a wide standard. But they've chosen
25 not to do that.

1 THE COURT: Well, luckily, whether this really does
2 have value for academics or whether or not gambling is the
3 right word, none of that really matters. What really matters
4 is (a) whether or not this case should be transferred and, if
5 it's not transferred, whether or not dismissal should be
6 granted.

7 So here's where I want to leave it: I don't know
8 exactly what I'm going to do, because I think both of those
9 calls are close and they require a little bit more time. But
10 if I were -- if you wanted me to make a ruling from the bench
11 right now, it would be I'd grant the motion to dismiss and I
12 don't think you want me to do that.

13 So what may happen is you win and lose. You lose on
14 the motion to transfer but you win on your ability to have
15 another judge who is smarter than me determine whether or not
16 their motion to dismiss is -- is a good one. And that's, of
17 course, presupposing that Judge Yeakel is going to adopt my
18 report and recommendation. I don't know what he's going to do.
19 But I'm just telling you these are going to build in more
20 delays. I don't know when you're going to get to that
21 preliminary injunction hearing. But that's not my problem,
22 although he does send those to me from time to time.

23 So that's kind of where I'm leaning, gentlemen, and
24 that's what I want to share with you.

25 MR. EDNEY: Can I leave two --